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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 138

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. THE EDISON & KINGLAND ELEC. RAILWAY COMPANY,

Plaintiff in Error,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN E. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Defendants in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

Brooklyn Law Review

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COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of RICHARD REID ROGERS,

Relator-Appellant,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Respondents.

STATEMENT AS TO JURISDICTION.

1. Pursuant to paragraph 1 of Rule 12 of the Supreme Court of the United States, the relator files with his petition for appeal this statement showing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of such appeal.

Subdivision (a) of Section 237 of the Judicial Code of the United States, as amended (Code of Laws, 1934 Ed., Title 28, section 344-a), provides as follows:

> "237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision

is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

2. The statute of the State of New York the constitutionality of which is involved herein is Article 16 of the Tax Law of said State, being Chapter 627 of the Laws of 1919, Section 1, as amended, particularly Section 351 of said Tax Law, which reads as follows:

"351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen."

3. The judgment sought to be reviewed is the final judgment which was entered on the 2nd day of May, 1936, in

the Supreme Court of the State of New York, in the County of Albany, upon the remittitur of this Court, sent down pursuant to the decision of this Court made on the 28th day of April, 1936, affirming the order and decision of the Appellate Division for the Third Department.

4. The constitutional point is predicated upon the fact that the annual salaries paid the appellant by the Panama Rail Road Company for the years 1927, 1928 and 1929 were salaries paid to an essential officer of an instrumentality of the Government of the United States, to-wit, the Panama Rail Road Company, and therefore, under the Constitution of the United States and particularly Article 1, Section 8, thereof, not subject to State taxation.

This point was considered by the Appellate Division for the Third Department, and was indeed the only point decided by it, as appears from the following extract from the opinion of that court (R. 154):

> "Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Relator, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal Government and the various State governments are mutually immune from taxation by the other. The doctrine is thoroughly imbedded in our jurisprudence that a State is without power to tax the property or the agencies or instrumentalities of the United States. Similarly, the Federal Government lacks power to tax State property or agencies." (*Van Brocklin* v. *Tennessee*, 117 U. S. 151; *McCulloch* v. *Maryland*, 4 Wheat. 436; *Collector* v. *Day*, 11 Wall. 113).

The decision of that court and of this Court on appeal, the court of last resort in the State, was in favor of the validity of the taxing power of the State of New York as taxing the appellant's salary, although it was urged upon both courts that the statute, as above set forth, if so applied was contrary to the Constitution of the United States; as is more particularly set forth in the assignment of errors annexed hereto.

The case is therefore one in which a review by the Supreme Court of the United States may be had as of right.

5. Special reference in this connection is made to the following decisions of the Supreme Court:

Bryant v. *Zimmerman,* 278 U. S. 63, 67, where it was said:

> "There are various ways in which the validity of a State statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the State court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Bell's Gap R. R. Co. v. *Penn.,* 134 U. S. 232, 235;
Bridge Proprietors v. *The Hoboken Co.,* 1 Wall. 116, 142;
Ward v. *Love County,* 253 U. S. 17;
Carpenter v. *Shaw,* 280 U. S. 363, 369.

6. In the present case the appellant paid his State income tax for the years in question, under protest; and the last two cases cited support the view that the failure of the State courts to order its refund, assuming it to be

untaxable, is in itself a denial of due process under the Fourteenth Amendment.

7. While the appellant has no doubt of the direct appealability of the decisions of the State court above referred to, to the Supreme Court; it is the present law that the statement as to jurisdiction may be treated by the Supreme Court, if necessary, as a petition for a writ of certiorari. In that view, the appellant begs leave to submit the following additional considerations:

The following propositions were advanced by the appellant in the Appellate Division for the Third Department: (1) that the Panama Rail Road Company was a wholly owned instrumentality of the Government of the United States; (2) that as such it was exempt from State taxation; and (3) the instrumentality being so exempt, the fixed salaries paid to its officers and employees were likewise exempt from State taxation. The general principles thus asserted were uncontested by the Appellate Division, as appears from an examination of the opinion; and were admitted by the Attorney-General upon the argument in this Court. It was, however, insisted that the Panama Rail Road Company, even though an instrumentality of the Federal Government, was engaged in undertakings of a private commercial character, viz., the operation of a railroad and a steamship line, and the conduct of a commissary department on the Isthmus, from which it derived a profit; that this was a departure from ordinary governmental functions; and that the company therefore could not claim that immunity from State taxation applicable to Federal instrumentalities engaged in normal governmental activities which might otherwise exist. From this premise it followed as a logical conclusion that the Panama Rail Road Company having itself no exemption the salaries paid to its officers and employees could not be exempt.

The long line of acts of Congress and executive orders having the force of law set forth in the record, and the well-known history of the Panama Canal, and the part played by the Panama Rail Road Company as an adjunct in its construction, operation, maintenance and protection, as well as the characterization of that company by the Supreme Court of the United States as "an instrumentality of the United States Government in connection with the Canal" (*United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, 6); put beyond doubt the fact that the Panama Rail Road Company is indeed an instrumentality of the national government. This was frankly admitted by the Attorney-General in the argument before this Court. That being so, have the several State courts been well grounded, in holding that by reason of the company's participation in certain commercial activities at a profit the immunity which would otherwise exist has been lost?

It is respectfully submitted that this conclusion is contrary to the decisions in the United States courts, including the Supreme Court itself.

The Panama Rail Road Company was bought, at the same time as the unfinished Panama Canal, from the old French Canal Company for a lump sum of $40,000,000, pursuant to the Act of Congress of June 28, 1902 (32 U. S. Stat. 481). The policy of making it "an *adjunct* to the construction of the Canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama," was immediately declared by President Roosevelt, to whom Congress entrusted the execution of its mandate (fol. 97). Mr. Taft, Secretary of War, in whose department the Canal operations lay, declared that "the purpose of using the railroad to assist in the construction of the Canal will be largely defeated unless the representatives of the United States

may use the railroad without let or hindrance" (letter transmitting first report of Isthmian Canal Commission, Dec. 1, 1904—referred to by the Supreme Court in *U. S.* v. *McCarl, supra*).

With this preliminary statement, reference will now be made to the so-called commercial or non-governmental activities which are held to denude the Panama Rail Road Company of its immunity from State taxation. They are the operation of the railroad itself, the operation of its steamship line, and the operation of its commissary department.

As to the railroad, it was quite impossible for the Government, without disregarding contractual rights, to discontinue its operation. The concessionary contract of 1867 with Colombia, subsequently effective with respect to the Republic of Panama, provided for the perfection of the work of the railroad, "in order that it may better answer the necessities of the commerce of the world." Both President Roosevelt in his original order (*supra*) and Mr. Taft in his first report recognized this duty. The latter said:

> "Of course, under the franchise authorizing the operation of the railroad there is an obligation upon those who run the railroad and use the franchise to perform the duty of a common carrier" (doc. cited above).

As to the steamship line, as the Secretary of War, Mr. Davis, declared (fol. 113):

> "The line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country."

As to the commissary department, it was merely an instrument employed by the United States to avail of the

privileges conferred by Article XIII of the Treaty of November 18, 1903, between the United States and Panama, which provided that the United States should have the right to import into the Canal Zone all "articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies, and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families."

Considering the necessity or the advisability of continuing the commercial activities thus outlined—as to which necessity or advisability the Government of the United States must be the judge—the question arises whether these commercial purposes, as they are characterized by the Appellate Division, are not merely *incidental* to a main governmental purpose, to-wit, the construction, operation, maintenance and protection of the Canal; and whether by their exercise the immunity drawn from the main governmental purpose has been lost. On this point the appellant submits that the decision in the State courts is contrary to the decisions of the courts of the United States, as follows:

M'Culloch v. *Maryland*, 4 Wheat. 316;

Osborn v. *United States Bank*, 9 Wheat. 738, 859;

Baltimore National Bank v. *State Tax Commission of Maryland*, 297 U. S. 209;

United States v. *Coghlan*, 261 Fed. Rep. 425, 426;

Kings County v. *U. S. Emergency Fleet Corporation*, 282 Fed. Rep. 950;

(The last two cases cited with approval by the Supreme Court in *Clallam County* v. *United States*, 263 U. S. 341, 345);

Commr. of Internal Revenue v. *Ten Eyck*, 76 F. (2d) 515.

In *Osborn* v. *United States Bank,* the contention was raised that the Bank of the United States was an individual concern founded upon contract between individuals, "having private trade and private profit for its great end and principal object." The decision in *M'Culloch* v. *Maryland* was nevertheless adhered to, it being held that the fundamental governmental purpose of the bank overrode the commercial consideration.

In *Baltimore National Bank* v. *Tax Commission of Maryland* it was recognized that bank stocks held by the Reconstruction Finance Corporation could be taxed *only* by virtue of the consent of Congress; which has not been given with respect to the Panama Rail Road Company.

In *United States* v. *Coghlan* and *Kings County* v. *United States Emergency Fleet Corporation*—approved by the Supreme Court in *Clallam County* v. *United States*—it was held that the property of the Fleet Corporation, likewise a corporation in which the United States was the sole stockholder, could not be taxed by the States; although it is well known that the Fleet Corporation was operating a large fleet of ocean steamers on commercial routes, charging freights and competing with other ocean carriers.

In *Commissioner* v. *Ten Eyck,* it was held by the United States Circuit Court of Appeals that salaries paid by a New York corporation engaged in the improvement of the Hudson River navigation was not subject to Federal income taxation, even though the corporation exercised certain commercial activities. C/f *Dobbins* v. *Commissioner of Erie County,* 16 Pet. 435, 448.

8. There arises at this point another thought which involves a question of public interest. The United States, being exclusively a government of delegated powers, has no authority under the Constitution to engage in any form of private business. As said by Justice Gray, delivering

the opinion of the Supreme Court in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 155, 158.

> "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All property must be held, just as taxes are levied, to pay the debts and provide for the common defense and general welfare of the United States."

The United States, under the Constitution, therefore, stands in an entirely different posture from the States or their municipalities, which possess two powers, one governmental and public (*e. g.*, the maintenance of streets and roads) and the other private (*e. g.*, the operation of a transportation system). See *Lloyd* v. *Mayor*, 5 N. Y. 369, 374. The United States has no choice; all property held by it must be held in a governmental capacity; otherwise, it is held in the teeth of the law. To illustrate: the Canal charges tolls as any private carrier, earns profits, and competes with the transcontinental railroads. But can there be any doubt that in its construction and operation the central government is exercising a governmental, and even an ordinary governmental function? If not, the whole enterprise is an usurpation and in defiance of the law.

This distinction should be borne in mind in considering the effect of cases like *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Helvering* v. *Powers*, 293 U. S. 214; upon which the decision of the Appellate Division was chiefly rested. In these cases it was held that the State or one of its subdivisions had engaged in business as a private trader; and had therefore sacrificed its ordinary immunity from Federal taxation. The States may do that very thing. The Federal Government cannot. There is not room for the distinction, drawn by the opinion in this case, between the Panama Rail Road Company as a governmental agency and the Panama Rail

Road Company as a private enterprise. In holding the railroad and operating it as it does, the Government is proceeding within governmental lines, or it is proceeding *ultra vires* and without warrant of law. The presumption that it is *not* proceeding in this latter aspect, it is submitted, is too strong to be overthrown.

These considerations present a situation which involves not only a conflict of State and Federal decisions, but a public question of great importance, which questions cannot be adequately dealt with on a motion of this character, or even on an application for a writ of certiorari, should that procedure be deemed necessary; and which in any aspect merit examination and review by the Supreme Court of the United States.

RICHARD REID ROGERS,
Relator and Proposed Appellant, Pro se.